MAR 23 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

No. 858

KENNETH ERNEST CHODORSKI, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

INDEX

Subject Index

	PAGE
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Selective Service Regulations involved	5
Statement of the case	5
Reasons for granting the writ	10
Conclusion	19
Appendix A—Opinion of Court of Appeals	19
Appendix B—Judgment of Court of Appeals	27
Appendix C—Order denying petition for rehearing	28

Cases Cited

Bejelis v. United States 206 F. 2d 354 (6th Cir. 1953)	13
Davis v. United States 199 F. 2d 689, 690-691 (6th Cir. 1952)	13
Estep v. United States 327 U. S. 114, 121 (1946)	16
Falbo v. United States 320 U. S. 549 (1944)	16
Franks v. United States 216 F. 2d 266 (9th Cir. 1954)	10
Johnson v. United States 126 F. 2d 242 (8th Cir. 1942)	16
Knox v. United States 200 F. 2d 398 (9th Cir. 1952)	10, 14, 15
Mintz v. Howlett 207 F. 2d 758, 763 (2d Cir. 1953)	10, 14
Niznik v. United States 173 F. 2d 328, 331 (6th Cir. 1949)	11, 12

Cases Cited *continued*

PAGE

Niznik v. United States
184 F. 2d 972 (6th Cir. 1950) 10, 11, 12, 13, 14, 17
Shepherd v. United States
217 F. 2d 942, 946 (9th Cir. 1954) 18
Sicurella v. United States
348 U. S. 385 (1955) 18
Skinner v. United States
215 F. 2d 767 (9th Cir. 1954) 16
United States v. Fielder
136 F. Supp. 745 (E. D. Mich. 1954) 13, 18
United States v. Kose
106 F. Supp. 433 (D. Conn. 1951) 13, 18
United States v. Vincelli
215 F. 2d 210 (2d Cir. 1954), 216 F. 2d 681 15
United States v. Zieber
161 F. 2d 90 (2d Cir. 1947) 10

Other Authorities Cited

Federal Rules of Criminal Procedure, Rules 37 (b) (2), 45 (a) 2
Regulations, Selective Service (32 C. F. R. § 1602 *et seq.*)
Section 1622.43 5
Section 1626.23 ..... 5, 16
18 U. S. C. § 3231 2
28 U. S. C. § 1254 (1) 2
United States Code, Title 50, App., Section 451-470 (Universal Military Training and Service Act) .. 5
Section 10 (b) (3) 3, 16
Section 16 (g) (1), (2), (3) 2

Supreme Court of the United States

OCTOBER TERM, 1956

No.

KENNETH ERNEST CHODORSKI, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction of petitioner by the United States District Court for the Northern District of Illinois for a violation of the Universal Military Training and Service Act.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, p. 19, *infra*) is not yet reported. The opinion of the District Court is not reported. [R. 67-71]

JURISDICTION

The judgment of the Court of Appeals was entered in this case on September 28, 1956. (See Appendix B, *infra*,

page 27.) A petition for rehearing was filed on October 11, 1956. It was denied on February 28, 1957. (See Appendix C, *infra*, page 28.) The time for filing this petition for writ of certiorari expires March 31, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1). (See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.) The District Court had jurisdiction under 18 U. S. C. § 3231.

QUESTIONS PRESENTED

I.

Since the definition of the term minister of religion appearing in the act and the regulations does not hinge the exemption from service upon whether the minister has been graduated from a theological seminary, did the local board deny the petitioner procedural due process of law or a full and fair hearing upon his personal appearance by holding that he was not entitled to the exemption because he had not been graduated from a theological seminary?

II.

Since the act and the regulations do not contemplate that the *de novo* classification by an appeal board cures the refusal of a full and fair hearing by the local board, resulting in denial of procedural due process of law, did the court below commit reversible error in holding that the appeal board classification cured the illegal action by the local board?

STATUTES INVOLVED

Section 16 (g) (1), (2) and (3) of the Universal Military Training and Service Act prescribes the definition of a minister:

> "The term 'duly ordained minister of religion' means a person who has been ordained, in accordance

with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."—50 U. S. C. App. § 466 (g) (1), (2) and (3), 62 Stat. 624.

Section 10 (b) (3) of the act provides:

"The President is authorized—

* * * * *

"(3) to create and establish within the Selective Service System civilian local boards, civilian appeal

boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title [said sections], together with such other duties as may be assigned under this title [said sections]. Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title [said sections], of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. There shall be not less than one appeal board located within the area of each Federal judicial district in the United States and within each Territory and possession of the United States, and such additional separate panels thereof, as may be prescribed by the President. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States and who are not members of the armed forces. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title [said sections], and the determination of the President shall

be final. No person who is a civilian officer, member, agent, or employee of the Office of Selective Service Records or the Selective Service System, or of any local board or appeal board or other agency of such Officer or system, shall be excepted from registration or deferred or exempted from training and service, as provided for in this title [said sections], by reason of his status as such civilian officer, member, agent, or employee; . . . "—50 U. S. C. App. § 460 (b) (3), 62 Stat. 618, 65 Stat. 87.

SELECTIVE SERVICE REGULATIONS INVOLVED

Section 1622.43 of the Selective Service Regulations (32 C. F. R. § 1622.43) reads in part as follows:

> "1622.43 Class IV-D; Minister of Religion or Divinity Student.—(a) In Class IV-D shall be placed any registrant:
>
> "(1) Who is a regular minister of religion;
>
> "(2) Who is a duly ordained minister of religion; . . . "

Section 1626.23 of the Selective Service Regulations provides: "If any steps have been omitted by the local board . . . the appeal board shall return the file to the local board with a request for . . . action."—32 C. F. R. § 1626.23.

STATEMENT OF THE CASE

This criminal action was brought by indictment charging petitioner with a violation of the Universal Military Training and Service Act. (50 U. S. C. App. §§ 451-470) Petitioner was charged with failing and refusing to perform civilian work contrary to the act. [R. 5-6] The petitioner pleaded not guilty. [R. 2]

The case proceeded to trial before the judge without a jury, which was waived. [R. 2-3] Testimony was received

and documentary evidence admitted into the record. [R. 7-63]

A motion for judgment of acquittal was made at the close of all the evidence. [R. 4, 63-66] The motion for judgment of acquittal was denied. [R. 4, 66] The trial judge found petitioner guilty, entered a judgment of conviction and sentenced petitioner to one year and one day in the custody of the Attorney General of the United States. [R. 4, 35, 104] The court filed a written memorandum giving reasons for the judgment rendered. [R. 67-71]

The case was duly appealed to the court below. [R. 71] The case was duly briefed, argued and submitted, resulting in an affirmance of the conviction. A petition for rehearing in the court below was denied after it was held under advisement for several months. (Appendix C, *infra*, page 28.)

Petitioner, Kenneth Ernest Chodorski, was born January 12, 1931. [R. 17] He registered with his local board January 16, 1950. [R. 16-17] He showed that his business was shipping clerk for the Undertakers' Supply. [R. 16-17]

He filed a questionnaire with the local board on February 12, 1951. [R. 19] He showed that he was a minister of religion customarily serving as such since August 22, 1944, on which date he was ordained to preach for Jehovah's Witnesses. [R. 20-21] He gave his present occupation as drill press operator, stating that he had been in this work for six months and expected to continue indefinitely. [R. 21] He stated that his employer was Roman Broman, whose business was making printing presses. [R. 22] He earned $1.35 an hour and worked an average of 40 hours per week. [R. 22] He stated he had attended two years of high school but was not graduated. [R. 22] He certified that he was a conscientious objector. [R. 23] Attached to his questionnaire was an affidavit in which he discussed his claim for exemption as a minister of religion. [R. 27-29] On March 5, 1951, he was classified I-A by the local board and 11 days later notified of it. [R. 24] He requested a personal appearance within the 10-day period fixed by law. [R. 30-31]

The board notified him to appear before it for a hearing on August 6, 1951. [R. 31]

He appeared for the hearing on August 6, 1951. [R. 25] At the personal appearance two members of the draft board, the clerk and Chodorski's mother were present. David Sark was the chairman of the local board. At the personal appearance when Chodorski attempted to explain his ministerial status, the chairman stated that "none of Jehovah Witnesses, in his estimation, would be classified 4-D as ministers. . . . Then he also brought out a book that named various religious organizations and stated that Jehovah Witnesses were not a recognized religious organization according to that book. . . . he claimed since we were not there, none of Jehovah Witnesses attended accredited seminaries, so they were not worthy of having a 4-D classification." [R. 11-12]

The local board classified Chodorski I-A on August 6, 1951, and on August 9, 1951, mailed him notice of the classification. [R. 25]

On August 20, 1951, Chodorski took an appeal from the classification. Accompanying his appeal was a notice of his full-time ministerial appointment dated May 1, 1951. [R. 32] In his notice of appeal he said:

> " . . . The local board seems to be confused on one point and that is I did not graduate from any of the theological or seminary schools.
>
> "It has been held by the federal United States Court of Appeals of the Sixth Circuit that the Selective Service boards must not decide cases on a non sequitur basis. The draft boards may not reach the conclusion that Jehovah's Witnesses are not ministers and are not entitled to classification as ministers because they had not attended a theological seminary. . . .
>
> "Disregard of this provision and refusal to classify as a minister of religion solely on the grounds that

appellants were members of a religious sect and that they had not attended a religious seminary was arbitrary and contrary to the law and regulations. . . .

"I have been appointed by the Watchtower Society as a minister to preach in connection with the Chicago North Unit Co. which at this time I am filing a card and a letter from the Watchtower to this position. I have been appointed since May, 1951. Affidavits, certificates, and letters from my recognized church showing that I am a member and minister of religion has been filed with the local board." [R. 33, 34]

On the same date Chodorski filed with the local board a statement as follows: "Now I am a full time minister known as a pioneer." [R. 35] Also filed with the board was a pioneer appointment certificate issued to full-time ministers by the Watchtower Bible and Tract Society, Inc. It showed that Chodorski was required as a pioneer "to serve in the field on the basis of a quota of 100 hours a month, or 1,200 hours a year, performing the ministry from house to house, by means of back-calls and Bible studies, in magazine work and in other ways, generally engaging in all features of the service." [R. 37]

He was directed to take a physical examination on December 11, 1951. [R. 25, 39] He was found to be physically acceptable. [R. 39-40]

On March 13, 1952, the appeal board referred the case to the Department of Justice for investigation and report concerning the bona fides of the conscientious objector claim. [R. 25] The Department of Justice investigated the claim, conducted a hearing and made a report in favor of the claim. In the report of the Department of Justice it is stated:

" . . . Registrant informed the Hearing Officer that he was ordained in 1944 and served as a 'Pioneer' for five months but was obliged to quit being a 'Pioneer' to engage in secular work to support himself.

He stated that he is presently employed as a color matcher by the Internal Chemical Corporation and that he transferred to night work, accepting a lower salary, so that he could attend Theocratic Ministry School." [R. 41-42]

The file was then forwarded to the appeal board for its decision. The appeal board on October 22, 1952, classified Chodorski as a conscientious objector, placing him in Class I-O. [R. 43] On that date Chodorski was notified of his classification. [R. 25] Chodorski replied to the notice and complained about the I-O classification. [R. 44-45]

On November 12, 1952, Chodorski was notified by Form 152 to make a suggestion of three types of civilian work. The next day the local board wrote Chodorski in reply to his letter of November 6, stating that his Form 152 had been mailed to him and that he should select three types of civilian work as required by November 17. [R. 45-46] On November 17, 1952, Chodorski appeared before the board and refused to accept civilian work. [R. 46-47]

On December 30, 1952, Chodorski was notified to appear January 12, 1953, for a special meeting with a representative of the State Director for the purpose of reaching an agreement as to the type of civilian work that he should perform. [R. 25-26] He appeared on January 12, 1953, and refused to reach an agreement. [R. 47] At this hearing he filed with the local board a letter showing that he had re-entered the full-time ministry of Jehovah's Witnesses. In this letter he stated:

"On January 1st 1953, I entered the pioneer ranks of Jehovah's Witnesses. I have been assigned by the Watchtower Society to work in the North Unit of Jehovah's Witnesses. In doing this I put in 100 hours per month, preaching from door to door, making backcalls and holding bible studies in peoples homes. . . .

"Since Jehovah's Witnesses are a recognized organization and I am a minister of religion, I believe my

classification should be 4D." [R. 48, 49] This letter was presented to the board at its hearing on January 12, 1953.

On a review of the file by the State Director, additional steps omitted to be taken were directed. [R. 51-52] The board recommended that Chodorski be assigned to Manteno State Hospital. The State Headquarters, on approval of the National Director, authorized the local board to issue an order commanding Chodorski to do work at the hospital. [R. 26, 53-54]

On June 23, 1953, the local board ordered Chodorski to report for civilian work on July 6, 1953. [R. 26, 55] In the instructions sent by the State Director to Chodorski he was notified that he could not do any preaching work at the hospital. Chodorski replied to the board, "this I cannot do because preaching is my life." [R. 56] He requested the board to reconsider his classification and change him to Class IV-D. [R. 56] Chodorski submitted his pioneer appointment of January 1, 1953. [R. 59-62] The local board on July 2, 1953, considered the letter and refused to reopen the case because of the ministerial status of Chodorski. [R. 57] Chodorski failed to report at the hospital for civilian work and was ordered to be prosecuted. [R. 58-59]

REASONS FOR GRANTING THE WRIT

I.

The holding of the court below, that the reclassification by the appeal board cured the denial of procedural due process by the local board in defying the definition of the term "minister of religion" is in conflict with *Mintz* v. *Howlett*, 207 F. 2d 758 (2d Cir. 1953); *Knox* v. *United States*, 200 F. 2d 398 (9th Cir. 1952); *Franks* v. *United States*, 216 F. 2d 266 (9th Cir. 1954); and *United States* v. *Zieber*, 161 F. 2d 90 (3rd Cir. 1947).

There is a direct conflict between the holding of the court below and the holding in *Niznik* v. *United States*, 184

F. 2d 672 (6th Cir. 1950). The *Niznik* case involved an identical ruling by the local board. In that case there was an appeal to the appeal board, resulting in a denial of the ministerial exemption claim. Also in *Niznik* each of the registrants was, as a matter of law, not entitled to the exemption because the ministry was his avocation instead of his vocation. The Court of Appeals for the Sixth Circuit on facts identical to those involved in this case held that there was a denial of procedural due process. While the Sixth Circuit in *Niznik* did not write upon the question of whether the *de novo* classification cured the denial of procedural due process by the local board, the court did implicitly pass upon that question and held that it did not. It cannot be asserted that this point was not considered by the Sixth Circuit because upon the appeal the Government argued that the denial of procedural due process had been cured by the appeal board classification.

An entire paragraph is written by the court below about the holding in *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir. 1950), in a vain attempt to distinguish it. (See Appendix A, *infra,* page 24.) The court confused this holding with the holding in the earlier appeal, *Niznik* v. *United States,* 173 F. 2d 328 (6th Cir. 1949). The first Niznik appeal (173 F. 2d 328) involved several questions, including the failure to send up a complete record to the appeal board by the local board. This point, although raised on the second appeal, was not passed upon at all in the holding of the court in the second appeal. The second opinion (184 F. 2d 972) did not consider this point at all.

It is entirely misleading and confusing for the court in *Chodorski* to speak of points involved in the first holding (173 F. 2d 328) when speaking of the second holding (184 F. 2d 972) that did not pass on the point of failure to send up a full and complete record. The only point determined in the second appeal (184 F. 2d 972) was the failure of the local board to proceed according to law on the personal appearance, which is the same point involved in this case.

The Court of Appeals in the second opinion (184 F. 2d 972) referred to the statement of facts in the first opinion (173 F. 2d 328) for a full statement of facts. In the first opinion (173 F. 2d 328) the court, among other things, stated: "After the hearing, the local board again classified appellants as I-A, and, on appeal, their classification was changed to IV-E, available for work of national importance." (173 F. 2d 328, at page 331) It appears from this statement that there was a *de novo* classification by the appeal board whereby the liability was changed from military service to that of a conscientious objector. The facts appear to be, therefore, identical to the facts in the case of *Chodorski* and the Court of Appeals for the Sixth Circuit decided—upon the facts of the case—that the denial of procedural due process of law by the local board was not cured by the *de novo* classification by the appeal board.

The court in *Chodorski* says: "The opinion is silent on this point, but merely holds that the defendant was deprived of procedural due process before the local board." (See Appendix A, *infra*, page 24.) The court then adds that "in the absence of the record, we are unable to determine the limits of the exact holding." It is submitted that the exact limits of the holding do appear on the face of the opinion. Read the facts stated in the first opinion that were adopted in the second opinion (184 F. 2d 972). These show that there was a *de novo* classification by the appeal board that was not considered enough to cure the denial of procedural due process by the local board. The court in *Chodorski* failed to turn up anything which distinguishes the facts in this case from the facts involved in the second appeal considered in *Niznik* v. *United States*, 184 F. 2d 972 (6th Cir. 1950), where the precise question ruled on by it was considered.

Any doubt that has been generated by the opinion of the court in *Chodorski* about the law established by the Court of Appeals for the Sixth Circuit that the *de novo* classification by the appeal board does not cure the denial

of procedural due process by the local board is removed when this Court considers other opinions of the Court of Appeals for the Sixth Circuit. In both of such cases that court also held that the denial of rights upon a personal appearance by the local board made the final draft board order based on a *de novo* appeal board classification invalid. —See *Davis* v. *United States,* 199 F. 2d 689 (6th Cir. 1952) at pages 690-691; *Bejelis* v. *United States,* 206 F. 2d 354 (6th Cir. 1953).

It is interesting to note that the court in *Chodorski* does not attempt to hold directly that the United States Court of Appeals for the Sixth Circuit is wrong in *Niznik* v. *United States,* 184 F. 2d 972 (1950). That court persisted in a faulty and groundless distinction. But that court said that *United States* v. *Fielder,* 136 F. Supp. 745 (E. D. Mich. 1954), and *United States* v. *Kose,* 106 F. Supp. 433 (D. Conn. 1951), are "disapprove[d]." That court concerning these two district court opinions said that the "controlling facts are not clear." A careful reading of the opinions in the two cases *clearly* shows that the final order to perform service in each case was invalidated for the reason that the final order in *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir. 1950), was invalidated. *United States* v. *Fielder,* 136 F. Supp. 745 (E. D. Mich. 1954), expressly followed the decision of its own Court of Appeals in *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir. 1950).

It patently is inconsistent judicial writing in *Chodorski* to reject the district court opinions and in the same breath attempt to distinguish the court of appeals opinion (184 F. 2d 972). Either all three opinions are right or all three are wrong. But one cannot be right and the other two wrong. Really, instead of the opinions in those three cases not being "clear" as stated by the court in *Chodorski,* it is the opinion of the court in *Chodorski* that is not "clear" because of its inconsistent treatment of those three opinions. This inconsistency on the part of that court in its opinion calls for its rejection.

It is respectfully submitted that, upon a consideration of the opinion in this case by the court below and the opinion of the Sixth Circuit in *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir. 1950), this Court should find that there is a direct conflict or one that is irreconcilable.

The attempted distinction of *Mintz* v. *Howlett,* 207 F. 2d 758 (2d Cir. 1953), by the court below (Appendix A, *infra,* page 24) fails completely. The court stated "the decision of the appeal board perpetuated the procedural errors before the local board." This statement by the court shows that it overlooked the crucial fact that the errors were "perpetuated" only by the district appeal board, whose decision was in turn set aside by the National Selective Service Appeal Board. The court in *Chodorski,* by accepting the statement in its brief in the case, permitted the Government to blind its eyes to what was stated by the court in *Mintz* v. *Howlett,* 207 F. 2d 758 (2d Cir. 1953), also at page 763, where the statement about "perpetuation" appears. There the court, after reviewing the memorandum by the appeal board "perpetuating" the local board's error, points out that the case was finally appealed to the National Selective Service Appeal Board. It showed that the national board affirmed the classification. The court said about the National Selective Service Appeal Board: "It stated no reasons; obviously its action did not cure the defects in petitioner's induction" based on the local board's action.

If the court in *Chodorski* had read the opinion in *Mintz* v. *Howlett,* 207 F. 2d 758, 763 (2d Cir. 1953), with clear factual glasses it would have seen (1) that the opinion in *Mintz* v. *Howlett,* 207 F. 2d 758 (2d Cir. 1953), is directly in point, (2) that opinion supported Chodorski and (3) the inept attempt to distinguish it was error.

It appears also (Appendix A, *infra,* pages 24-25) that the court below adopted in its opinion what was said in the Government's brief about *Knox* v. *United States,* 200 F. 2d 398 (9th Cir. 1952), with which the opinion below also conflicts. The court below said that the Court of Appeals

for the Ninth Circuit "seemed to have found in the facts something to justify the holding that the procedural irregularities reached into the appeal board." Nothing could be further from reality than this statement which is contradicted by what appears on the face of the opinion in *Knox* v. *United States,* 200 F. 2d 398 (9th Cir. 1952).

In the *Knox* case the registrant filed a conscientious objector form with the local board at the time of the personal appearance. Following the personal appearance the local board did not consider the case *de novo* but sent the case to the appeal board. (Compare *United States* v. *Vincelli,* 215 F. 2d 210 (2d Cir. 1954), on petition for rehearing, 216 F. 2d 681.) This alone was the local board's procedural irregularity. There is not one statement in the opinion or in the record in *Knox* v. *United States,* 200 F. 2d 398 (9th Cir. 1952), that indicates that the "procedural irregularities reached into the appeal board" as stated by the court below (Appendix A, *infra,* page 24). These were localized by the local board's action. The appeal board reclassified Knox without being prejudiced by the nonaction of the local board. No prejudicial statement was sent to the appeal board by the local board as stated in *Chodorski.*

The entire opinion of the Court of Appeals in *Knox* v. *United States,* 200 F. 2d 398 (9th Cir. 1952), not only contradicts what the court said in *Chodorski* about it in the opinion, but it also supports the very position that petitioner took. In that opinion the Court of Appeals also said:

> "... It appears to be the position of the Government that any lack in this respect is immaterial inasmuch as the registrant was classified anew as I-A by the appeal board, the latter having before it all the evidence bearing on the subject. ...
>
> "Classification by the local board is an indispensable step in the process of induction. The registrant is entitled to have his claims considered and acted upon by these local bodies the membership of which is composed of residents of his own community. An under-

> lying concept of the Selective Service System is that those subject to call for service in the armed forces are to be classified by their neighbors—people who are in a position to know best their backgrounds, their situation and activities."

The ruling made by the court below in this case is also in conflict with what the Court said in *Estep* v. *United States,* 327 U. S. 114, 121 (1946). There the Court said that if a "local board . . . classified a registrant as available for service, because he was a Jew, or a German, or a Negro, it would act in defiance of the law. . . . In all such cases its action would be lawless and beyond its jurisdiction." It should be noted that the Court said "local board." It knew that the appeal board had classified the registrant. It assumed that it was necessary to appeal for reclassification by the appeal board before the registrant could exhaust his administrative remedies. (*Falbo* v. *United States,* 320 U. S. 549 (1944); *Johnson* v. *United States,* 126 F. 2d 242 (8th Cir. 1942); *Skinner* v. *United States,* 215 F. 2d 767 (9th Cir. 1954)) The Court thus rejected the rationalization now accepted by the court below, which is that the appeal board reclassification cures a local board denial of procedural due process of law upon personal appearance.

The act and the regulations limit the power of the appeal board. The jurisdiction of the appeal board does not authorize the curing of denials of procedural due process of law by local boards. The power of the appeal board is, by the act and the regulations, restricted to the subject of classification. They give the appeal board no right to cure a procedural error of the local board. Read the act. It shows that the only action of the appeal board that is mentioned is its determination of the classification. Section 10 (b) (3) of the act (50 U. S. C. App. § 460 (b) (3), *supra,* pages 3-5) specifies this.

Section 1626.23 of the Selective Service Regulations provides: "If any steps have been omitted by the local board . . .

the appeal board shall return the file to the local board with a request for . . . action."—32 C. F. R. § 1626.23.

The act and the regulations, therefore, contemplate that, if a procedural error of law has been committed by the local board, then the only proper procedure for the appeal board to follow is to hold up classification and return the file to the local board until the proper steps have been taken.

This conflict of circuits on the question involved is one which should be resolved in the interests of orderly administration of the selective service laws in this field of criminal law. In addition the question is important for future cases of the same type which may arise. Every selective service case that arises under the act, where the registrant has exhausted his administrative remedies by appeal, and which involves a denial of procedural due process by the local board, presents the question. With the large number of cases constantly presenting the question this Court should grant the writ and determine the question.

II.

This case involves the interpretation of a very important question of law in the administration of the Universal Military Training and Service Act which should be resolved in the interest of orderly administration of such law. It is the question that was directly decided in *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir. 1950). Even the court below said:

> ". . . Upon the first question it is obvious from the record, we think, that the local board applied a wrongful test in determining the question presented to it of whether defendant was a minister of religion." (See Appendix A, *infra,* page 21.)

The refusal by the local board to follow the definition of a minister of religion fixed by Congress in the act was equivalent to a complete denial of any hearing at all. A

"hearing proceeding upon an erroneous theory . . . is no better than no hearing at all."—*Shepherd* v. *United States,* 217 F. 2d 942, 946 (9th Cir. 1954); see also *Sicurella* v. *United States,* 348 U. S. 385 (1955).

This petition presents, as above shown, a most important question of federal law which has not been, but which ought to be, reviewed by this Court. The denial of procedural due process by failure to follow the definition of the term "minister of religion" in the act is of wide public or national importance.

The problem is not temporary or limited to just a few cases. There are about four thousand local boards with whom thousands of registrants claiming exemption as ministers of religion have their cases. Several hundred of these boards have failed to comply with the regulation defining the term "regular minister of religion." Several thousand registrants are affected by the question here presented.

Two opinions of the district courts, invalidating orders of the local boards under circumstances identical to those described in the record in this case, demonstrate the importance of the question here presented. (*United States* v. *Fielder,* 136 F. Supp. 745 (E. D. Mich. 1954); *United States* v. *Kose,* 106 F. Supp. 433 (D. Conn. 1951)) Notwithstanding the holding of the court below (quoted at page 21, *supra*), that the local board "applied a wrongful test," the court below thereafter inconsistently attempted to destroy the holdings in *United States* v. *Fielder* and *United States* v. *Kose, supra,* by saying that those two opinions are "disapprove[d]." (See Appendix A, *infra,* page 25.)

It is submitted that the question presented in this case is of very great and wide public importance. It is of such a magnitude as to require this Court to grant the petition for writ of certiorari.

CONCLUSION

The petition for writ of certiorari should be granted for the reasons above stated.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Petitioner

March, 1957.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11699 — SEPTEMBER TERM AND SESSION, 1956.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH ERNEST CHODORSKI,
Defendant-Appellant.

Appeal from judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

[Reported at 240 F. 2d 590]

September 28, 1956

Before MAJOR, FINNEGAN and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Defendant, convicted of having failed and refused to perform civilian work, contrary to the Universal Military Training and Service Act, 50 U.S.C. App. Secs. 451, 470, appeals from the sentence entered in a trial by the court after a finding of guilt. Upon appeal, defendant contends that he was deprived of procedural due process of law in that the local board applied an erroneous formula of fact and law, to the effect that none of defendant's sect was entitled to be classified as a minister of religion.

Defendant registered with his local board January 16, 1950, stating that he was then employed as a shipping clerk for an undertaker supply company. In his questionnaire he claimed to be a minister but said that his then occupation was that of a drill-press operator, and that he had been working for six months in that capacity, and expected to continue doing so indefinitely. He was then earning $1.35 an hour, working an average of 40 hours per week. He declared that he was a conscientious objector and claimed exemption as a minister of religion. On March 5, 1951, he was classified I-A. He requested a personal appearance hearing and appeared before the board for such a hearing held on August 6, 1951. Thereafter the Board again classified him as I-A and mailed to him notice of its action.

On August 20, 1951, defendant filed with the local board an additional statement to the effect that he was then a full-time minister known as a pioneer, and delivered to the board a certificate to that effect. On the same day he appealed to the appeal board, and thereupon the local board delivered his complete file to the appeal board, and defendant filed with that board his additional statement of

evidence, renewing his statement that he was a regular minister of religion, setting forth in detail the facts upon which he based his claim.

The board of appeal referred the matter for investigation and report to the Department of Justice, which conducted a hearing and made a report recommending a finding that defendant was a conscientious objector and stating that defendant had informed the hearing officer that he was ordained in 1944, serving as a pioneer for 5 months, but had been obliged to quit serving as pioneer to engage in secular work in order to support himself, and that he was at that time employed as a color matcher by the Internal Chemical Corporation.

Upon the file, the statement filed with the appeal board by defendant and the report of the Department of Justice, the appeal board set aside defendant's classification by the local board as I-A and classified him as I-O, that is, a conscientious objector. Defendant, having been notified of his reclassification, refused to accept civilian work as directed by the local board. On December 30, 1952, he was notified to appear before a representative of the State Director for the purpose of reaching an agreement as to the type of civilian work he should perform. On January 12, 1953, he appeared but refused to make any agreement or to perform civilian work. He was then assigned to work at the Illinois State Hospital at Manteno. On his refusal to comply, he was indicted and convicted.

As we have stated, the question presented is the narrow one of whether defendant was deprived of procedural due process of law before the local board, and whether, if such was the fact, that error affects in any way his final classification by the appeal board. Upon the first question it is obvious from the record, we think, that the local board applied a wrongful test in determining the question presented to it of whether defendant was a minister of religion.

Under the statute the defendant had a right to and did

prosecute an appeal to the appeal board. The hearing before that board is *de novo*. The matter is heard upon the original file of the local board supplemented by such further evidence as the registrant shall offer and as may be obtained by a reference to the Department of Justice and a hearing officer. There is no complaint that the entire file of defendant was not sent to the appeal board by the local board. There is no charge of lack of procedural due process in this respect. It is clear that defendant filed his additional statement with the appeal board, that he appeared before the hearing officer and that the latter, after hearing other evidence, recommended that defendant be classified as a conscientious objector instead of I-A, as the local board had ordered. This classification of conscientious objector, made by the appeal board, was his final classification. Upon its entry the local board ordered him to report for civilian work.

In this situation we think there can be no question but that whether there was lack of procedural due process of law in the local board's refusal to apply the proper test as to what constitutes a minister in defendant's original hearing is wholly immaterial, in view of the appeal board's ultimate hearing and classification. In other words, the decision of the local board, in which it is claimed lack of procedural due process of law occurred, has been set aside and held for naught, in a new hearing, a *de novo* hearing, by the tribunal created by Congress for the correction of error upon the part of the local board.

We had before us a similar question in *United States* v. *Moore*, 217 F. 2d 428 (reversed on unrelated grounds, not presented to us, 348 U.S. 966). There, at pages 431 and 432 we analyzed the decisions bearing upon the issue and determined that the action of the board of appeal completely supersedes the action of the local board, and that the registrant cannot attack collaterally in a criminal proceeding the appeal board's classification upon which his induction has been ordered, because of prior action of the

local board claimed to amount to lack of due process of law. Here, the defendant would have the court inquire whether lack of due process occurred in a classification of I-A which the appeal board has set aside as erroneous and has superseded with its own and different classification upon which the order for induction was issued. We adhere to the decision in the Moore case and to the reasoning of the cases there cited. To our mind it matters not at all how illy conceived the local board's idea was as to the test for determination of the issues before it, for the reason that upon the record containing the evidence, defendant's statement, Department of Justice report, the appeal board heard the matter anew and set aside the board's classification and entered one of conscientious objector.

We might properly conclude this discussion with what has been said, for no question is raised as to the merits of the classification by the appeal board, no question as to the failure of defendant to comply with that classification; the validity of that classification is not before us. By what we have said we have determined the narrow issue raised. However, in view of defendant's zealous contentions we think it desirable to refer briefly, to the cases upon which he relies. In *United States* v. *Peebles,* 220 F. 2d 114, we held that the action of the local board depriving defendant of procedural due process reached up to the appeal board by the record there presented and affected the validity of the classification of the appeal board. That is an entirely different question from one, where, as here, no erroneous action is claimed to lie in the decision of the appeal board.

In *United States* v. *Henderson,* 223 F. 2d 421, we were not dealing with the original decision of the board reviewed by the appeal board, but with the final decision of the local draft board subsequent to the appeal, and condemned the further proceeding as depriving the defendant of procedural due process in that the board refused to reopen and reconsider defendant's classification on an

erroneous theory. This action had never been reviewed or modified by a board of appeal. In *Mintz v. Howlett,* 207 F. 2d 758, at 762 (CA-2) the court did not find in the decision of the appeal board any corrective action over the original error before the local board. It remarked that "it appears that the appeal board assumed the crucial fact in issue." Consequently, the decision of the appeal board perpetuated the procedural errors before the local board.

In *Niznik* v. *United States,* 173 F. 2d 328 (CA-6), and *Niznik* v. *United States,* 184 F. 2d 972 (CA-6), the court held that if material presented to the local board which should have been included by the local board in the registrant's file was not included so that the appeal board could consider it, then there was lack of procedural due process. Therefore, in the first case the judgment was reversed for a new trial in order that it could be determined whether there had been an omission by the local board to include in the record sent by the appeal board everything that the law required. In the second appeal the court failed to determine expressly whether a full and complete record had been sent to the appeal board and, if so, whether that board's decision should apply. The opinion is silent on this point, but merely holds that the defendant was deprived of procedural due process before the local board. Consequently, in the absence of the record, we are unable to determine the limits of the exact holding. We agree with that court that if the record which goes to the board of appeal does not contain all of the evidence submitted to the local board, then the hearing before the appeal board is without due process of law, but such is not our case.

In *Knox* v. *United States,* 200 F. 2d 398 (CA-9), the court seemed to have found in the facts something to justify the holding that the procedural irregularities reached into the appeal board, for it said that it was in full accord with the principles in *Martin* v. *United States,* 190 F. 2d 775 (CA-4) to the effect that procedural irregularities or

omissions which do not result in prejudice to the registrant are to be disregarded. Here, there is nothing to support a conclusion that the original irregularities before the local board affected the review by the board of appeal.

This is in line with the decision in *United States* v. *Zieber,* 161 F. 2d 90 (CA-3), where the court commented that if the local board refuses to include in the file evidence bearing upon the classification, then the registrant is denied due process of law and in such case action by the appeal board cannot cure the error, for the reason that the evidence has not been submitted in the file lodged with that board. In other words, the procedural error of the local board is perpetuated in the decision of the appeal board, because the local board has not furnished the complete file to the appeal board.

In *United States* v. *Fielder,* 136 F. Supp. 745, and in *United States* v. *Kose,* 106 F. Supp. 433, the controlling facts are not clear. However, if there is anything in those decisions conflicting with our conclusions in this case, we disapprove.

Mr. Justice Rutledge, in his concurring opinion in *Falbo* v. *United States,* 320 U.S. 549 at 555, had this to say: "Petitioner claims the local board's order of classification was invalid because that board refused to classify petitioner as a minister on the basis of an antipathy to the religious sect of which he is a member, And, if the question were open, the record discloses that some evidence tendered to sustain this charge was excluded in the trial court. *But petitioner has made no such charge concerning the action of the appeal board which reviewed and affirmed the local board's order.* And there is nothing to show that the appeal board acted otherwise than according to law. If therefore the local board's order was invalid originally for the reason claimed, as to which I express no opinion, *whatever defect may have existed was cured by the appeal board's action.*" (Emphasis supplied.) The language in *Tomlinson* v. *United States,* 216 F. 2d 12, at 16

(CA-9), is equally persuasive. The court held there that any error which the local board might have made with reference to ordination of a minister was precisely the sort of thing the appeal board was set up to correct. As the court said, so here, the whole record went to the appeal board along with the registrant's statement, in which he dealt with the precise question involved. If the local board erred, such error was cured by the *de novo* action of the appeal board.

The judgment is affirmed.

APPENDIX B

JUDGMENT OF COURT BELOW

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Friday, September 28, 1956

Before

Hon. J. EARL MAJOR, Circuit Judge
Hon. PHILIP J. FINNEGAN, Circuit Judge
Hon. WALTER C. LINDLEY, Circuit Judge

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11699

vs.

KENNETH ERNEST CHODORSKI,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Thursday, February 28, 1957

Before

Hon. J. EARL MAJOR, Circuit Judge
Hon. PHILIP J. FINNEGAN, Circuit Judge
Hon. WALTER C. LINDLEY, Circuit Judge

THE UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 11699 vs. KENNETH ERNEST CHODORSKI, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statutes and regulations involved	2
Statement	2
Argument	4
Conclusion	8
Appendix	9

CITATIONS

Cases:	
Bowles v. *United States*, 319 U. S. 33	5, 6
Capehart v. *United States*, 237 F. 2d 388, certiorari denied, 352 U. S. 971	6
Cox v. *United States*, 332 U. S. 442	5
Dickinson v. *United States*, 346 U. S. 389	5
Estep v. *United States*, 327 U. S. 114	5
Falbo v. *United States*, 320 U. S. 549	6
Knox v. *United States*, 200 F. 2d 398	7
Mintz v. *Howlett*, 207 F. 2d 758	7
Niznik v. *United States*, 184 F. 2d 972	7
Reed v. *United States*, 205 F. 2d 216, certiorari denied, 346 U. S. 908	6
Reese v. *United States*, 225 F. 2d 766	6
Tomlinson v. *United States*, 216 F. 2d 12, certiorari denied, 348 U. S. 970	6
Tyrrell v. *United States*, 200 F. 2d 8, certiorari denied, 345 U. S. 910	6
United States v. *Moore*, 217 F. 2d 428, reversed, 348 U. S. 966	6
Witmer v. *United States*, 348 U. S. 375	8
Statutes and regulations:	
Universal Military Training and Service Act, 62 Stat. 604, 611, 622, 624:	
Section 6 (g), 50 U. S. C. App. 456 (g)	5, 9
Section 12 (a), 50 U. S. C. App. 462 (a)	5
Section 16 (g), 50 U. S. C. App. 466 (g)	5, 9
32 C. F. R. (1954 Rev.) 1626.23	6, 10
32 C. F. R. (1954 Rev.) 1626.24 (b)	11

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 858

KENNETH ERNEST CHODORSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 19–26) is reported at 240 F. 2d 590. The opinion of the District Court (R. 67–71) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1956 (Pet. App. 27), and a petition for rehearing was denied on February 28, 1957 (Pet. App. 28). The petition for a writ of certiorari was filed on March 26, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, where there was basis in fact for denying petitioner IV–D (ministerial) classification and the

appeal board did not apply an erroneous test used by the local board, the final *de novo* I–O (conscientious objector) classification by the appeal board was valid.

STATUTES AND REGULATIONS INVOLVED

Pertinent sections of the Universal Military Training and Service Act and the Selective Service regulations are set forth in the Appendix, *infra,* pp. 9–11.

STATEMENT

Petitioner, having waived a jury trial, was convicted in the United States District Court for the Northern District of Illinois of failure and refusal to perform civilian work at a state hospital after a I–O (conscientious objector) classification. He was sentenced to imprisonment for one year and one day (R. 3–6, 66–67). On appeal (R. 71–72), the conviction was unanimously affirmed (Pet. App. 27).

At the trial, petitioner's Selective Service file was introduced in evidence as Gov. Ex. A (R. 8–9). Pertinent evidence may be summarized as follows:

On January 16, 1950, petitioner registered with his local board stating that he was a shipping clerk for an undertaker supply company (R. 16–18). In his classification questionnaire, he stated that he was a regular minister for Jehovah's Witnesses, having been ordained on August 22, 1944, and requested a IV–D (minister) classification (R. 20–21, 24). He mentioned that his then occupation was drill press operator for 40 hours per week at $1.35 per hour, and asserted that he was a conscientious objector (R. 21–22, 23). On March 5, 1951, petitioner was classified I–A by the local board (R. 24).

At his request, petitioner was granted a personal appearance on August 6, 1951 (R. 31). According to petitioner's testimony on the trial, the board chairman at this hearing stated that Jehovah's Witnesses were not a recognized religious organization, and that they should not be classified IV–D since none of them attended accredited seminaries (R. 11–12). On August 9, petitioner was again classified I–A and notice of the classification was mailed to him (R. 25).

On August 20, 1951, petitioner filed with the local board a statement that he was now a "full time minister known as a pioneer" (R. 35), a card from the Watchtower Bible and Tract Society certifying this (R. 32), and the "Pioneer" appointment directing him to spend at least 100 hours per month "performing the ministry from house to house, by means of back-calls and Bible studies, in magazine work and in other ways, generally engaging in all features of the service" (R. 36–38). On that same date, in his notice of appeal to the appeal board, petitioner set forth the basis for his claim to a IV–D classification, pointing out that the local board was confused in that he "did not graduate from any of the theological or seminary schools" (R. 33–35). On December 20, 1951, the entire file was forwarded to the appeal board (R. 25).

On March 13, 1952, the appeal board forwarded the complete file to the Department of Justice for investigation and hearing on the conscientious objector claim (R. 25). The hearing officer and the Department of Justice recommended a I–O classification, as shown in a letter dated October 14, 1952 (R. 40–42). The rec-

ommendation reported that petitioner "informed the Hearing Officer that he was ordained in 1944 and served as a 'Pioneer' for five months but was obliged to quit being a 'Pioneer' to engage in secular work to support himself" (R. 41). Petitioner also told the hearing officer that he was presently employed as a color matcher by the Internal Chemical Corporation (R. 41–42).

On October 22, 1952, the appeal board classified petitioner I–O (conscientious objector), and on October 28 notice of this was mailed to him (R. 43, 25). On November 17, he refused the three types of approved civilian work, stating that he would work only as a minister, although he would consider continuing work as a color matcher which he looked upon as an essential occupation (R. 46).

At a hearing before the local board on January 12, 1953, at which an Army officer explained the types of approved civilian work, petitioner repeated his claim to a IV–D classification and stated: "I can't accept any form of work because my ministry work is of primary importance" (R. 49–50). On June 23, 1953, the local board mailed to petitioner SSS Form 153 directing him to report for work at Manteno State Hospital on July 6 (R. 55, 26). On July 1, 1953, petitioner again requested a IV–D classification (R. 56). The board refused to reopen his case (R. 57). Petitioner failed to report at the hospital on the appointed date (R. 58), and his prosecution followed.

ARGUMENT

1. The substance of petitioner's argument is that, since the local board used an incorrect test in passing

upon his claim for a IV–D ministerial classification, he was denied procedural due process, and that this error could not be cured by the *de novo* conscientious objector classification made by the appeal board.

However, petitioner makes no claim that the appeal board rejected his claim for classification as a minister on an erroneous ground, or that there is no basis in fact for denial by the appeal board of the IV–D classification sought. *Estep* v. *United States,* 327 U. S. 114, 122–123; *Cox* v. *United States,* 332 U. S. 442, 448–449. He cannot seriously make such a claim in view of his admission that he was obliged to quit as a "Pioneer" so that he might engage in secular work to support himself (R. 41), and in view of his full-time vocation as a drill press operator (R. 22). Cf. *Dickinson* v. *United States,* 346 U. S. 389, 395. Petitioner obviously was not a regular or duly ordained minister who preached regularly as a vocation, so as to entitle him to exemption from service under Sections 6 (g) and 16 (g) of the Universal Military Training and Service Act (*infra,* pp. 9–10).

This Court has held that an erroneous interpretation of the law by a lower board is harmless if the final order (which is the origin of the duty to report for induction) rests on a *de novo* determination by an appellate authority. *Bowles* v. *United States,* 319 U. S. 33, 35–36. That decision is controlling here. In the instant case, the appeal board's *de novo* I–O classification, entered after evaluation of all relevant facts in the file regarding a potential ministerial classification, supersedes the action of the local board in classifying petitioner I–A and cures its errors in applying a wrongful test in denying a IV–D

classification. *Bowles* v. *United States, supra.* And compare the concurring opinion by Mr. Justice Rutledge in *Falbo* v. *United States,* 320 U. S. 549, 555. See also *Tomlinson* v. *United States,* 216 F. 2d 12, 15–16 (C. A. 9), certiorari denied, 348 U. S. 970; *Capehart* v. *United States,* 237 F. 2d 388, 389–390 (C. A. 4), certiorari denied, 352 U. S. 971; *Reed* v. *United States,* 205 F. 2d 216, 218 (C. A. 9), certiorari denied, 346 U. S. 908; *Tyrrell* v. *United States,* 200 F. 2d 8, 11 (C. A. 9), certiorari denied, 345 U. S. 910; *United States* v. *Moore,* 217 F. 2d 428, 431–432 (C. A. 7), reversed on other grounds, 348 U. S. 966; *Reese* v. *United States,* 225 F. 2d 766 (C. A. 9).

It was not necessary that the appeal board return petitioner's file to the local board so that it could make a new classification. The necessary implication of 32 C. F. R. 1626.23 (*infra,* p. 10) is that, if the information in the file is "sufficient to enable the appeal board to determine the classification of the registrant", the file need not be sent back for additional information or action. No suggestion is made that the information bearing on petitioner's claim for exemption as a minister was not before the appeal board. Careful and detailed explanations as to petitioner's ministerial claim were included in his file (R. 20–21, 27–31, 33–38) for study by the appeal board, which, applying proper standards, found them insufficient to warrant a IV–D classification but did grant petitioner a I–O (conscientious objector) classification. Under the statute and the regulations, petitioner is entitled to no more.

2. Cases cited by petitioner as being in conflict with the holding of the court below are inapposite. In

Niznik v. *United States,* 184 F. 2d 972 (C. A. 6) (Pet. 10–12), reversal was based upon prejudice of local board members in refusing to classify registrants as ministers solely upon the ground that they were Jehovah Witnesses, had not attended a religious seminary, and had not been regularly ordained. No question was there raised or decided as to the question involved here: whether the *de novo* classification by the appeal board failed to cure the local board's application of erroneous standards.[1]

In *Mintz* v. *Howlett,* 207 F. 2d 758 (C. A. 2) (Pet. 14), unlike the situation here, the error of the local board permeated the appeal board proceedings (and presumably also those of the national appeal board) so that the error was deemed not to have been cured. Similarly, *Knox* v. *United States,* 200 F. 2d 398 (C. A. 9) (Pet. 14–16), involved a conscientious objector claim which by its very nature is subjective and dependent upon the registrant's sincerity, thus making very important a classification by a local board consisting of a registrant's neighbors. In this case, the ministerial claim was predicated upon objective facts which the appeal board could judge as accurately as

[1] Petitioner is in error in asserting (Pet. 11) that in *Niznik* the Government argued that the *de novo* classification by the appeal board cured the local board's application of erroneous standards. The Government there made no such argument, presumably for the reason that in *Niznik* (unlike this case) the registrant contended that the local board had failed to submit a complete file to the appeal board. The only reference in the Government's *Niznik* brief (p. 19) to the appeal board's curing of an error by the local board relates to a wholly different matter—the use of a so-called secret investigation report by the local board.

the local board. Cf. *Witmer* v. *United States,* 348 U. S. 375, 381.

3. Contrary to petitioner's assertion (Pet. 2, 17–18), there is no question in this case as to whether a local board can refuse to follow the definition of a minister of religion fixed by Congress. As the court below recognized (Pet. App. 21), such action by a local board is undoubtedly erroneous. But it does not follow that the error cannot be cured, as in this case, by the application of proper standards on a *de novo* review. See *Bowles* v. *United States, supra.* A registrant acquires no vested right in a local board's error. Once it has been corrected, it affords no justification for refusal to accept a Selective Service assignment—here, an assignment to various types of civilian work approved for conscientious objectors.

CONCLUSION

The case was decided upon established legal principles, and there is no conflict in decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

APRIL 1957.

APPENDIX

The Universal Military Training and Service Act, 62 Stat. 604, 611, 622, 624, provides as follows:

Section 6 (g), 50 U. S. C. App. 456 (g):

Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled, shall be exempt from training and service (but not from registration) under this title.

Section 12 (a), 50 U. S. C. App. 462 (a):

Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Section 16 (g), 50 U. S. C. App. 466 (g):

(1) The term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a

community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

(2) The term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.

32 C. F. R. (1954 Rev.) 1626.23 provides:

Preliminary review.—The appeal board will carefully check each file to determine whether all steps required by the regulations have been taken, whether the record is complete, and whether the information in the file is sufficient to enable it to determine the registrant's classification. If any steps have been omitted by the local board, if the record is incomplete, or if the information is not sufficient to enable the appeal

board to determine the classification of the registrant, the appeal board shall return the file to the local board with a request for additional information or action. * * *

32 C. F. R. (1954 Rev.) 1626.24, as it read at the time herein involved, provided:

* * * (b) In reviewing the appeal, the appeal board shall not receive or consider any information which is not contained in the record received from the local board except (1) the advisory recommendation from the Department of Justice under § 1626.25, and (2) general information concerning economic, industrial, and social conditions.

U. S. GOVERNMENT PRINTING OFFICE: 1957